



**FEDERAL ELECTION COMMISSION**  
**Washington, DC 20463**

**Neil P. Reiff, Esq.**  
**Sandler, Reiff & Young, P.C.**  
**300 M Street, S.E., Suite 1102**  
**Washington, DC 20003**

**APR 29 2009**

**RE: MUR 5939**  
**Moveon.org Political Action and Wes Boyd,**  
**in his official capacity as treasurer**

**Dear Mr. Reiff:**

On September 20, 2007, the Federal Election Commission notified your clients, Moveon.org Political Action and Wes Boyd, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On April 2, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe your clients violated 2 U.S.C. § 441b(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

**Mark Allen**  
**Assistant General Counsel**

**Enclosure**  
**Factual and Legal Analysis**

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**MUR 5939**

**Respondents:** MoveOn.org Political Action and Wes Boyd, in his official capacity  
as treasurer

**I. INTRODUCTION**

The complaint in this matter by David A. Keene alleges that The New York Times Company ("The Times") made a corporate contribution to MoveOn.org Political Action ("MOPA"), a non-connected multicandidate committee, in connection with the rate The Times charged for an advertisement. The complaint alleges that MOPA paid \$65,000 for its full-page advertisement, far below The Times' typical charge of either \$167,000 or \$181,692 for full-page advertisements. The complaint concludes that this discount constitutes a corporate contribution from The Times to MOPA in violation of 2 U.S.C. § 441b.<sup>1</sup>

Based on available information discussed below, including information provided by MOPA, the Commission has determined that there is no reason to believe MOPA violated the Federal Election Campaign Act of 1971, as amended, ("the Act") in this matter.

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<sup>1</sup> The complaint further alleges that the amount of this discount constitutes an excessive contribution from The Times to MOPA. Because corporate contributions are generally prohibited and therefore not subject to specific limitation, the Commission addresses this matter as an alleged corporate contribution and not as an alleged excessive contribution. See 2 U.S.C. §§ 441b(a) and 441a(a).

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Background**

3 On Friday, September 7, 2007, MOPA contacted The Times regarding running an  
4 advertisement on Monday, September 10. The Times agreed to run MOPA's advertisement  
5 on that date and the parties agreed to a price of \$64,575. On September 10, The Times  
6 published the advertisement, titled "General Petraeus Or General Betray Us? Cooking the  
7 books for the White House." The advertisement contained a disclaimer, "Paid for by  
8 MoveOn.org Political Action, political.moveon.org, not authorized by any candidate or  
9 candidate's committee." MOPA's advertisement spawned public discussion of its content  
10 and criticism of The Times for allegedly reducing its normal advertising rate for MOPA. See  
11 Charles Hurt, *Times Gives Lefties a Hefty Discount for 'Betray Us' Ad*, NEW YORK POST,  
12 September 13, 2007; Claudia Parsons, *MoveOn got timely break on ad rate*, WASHINGTON  
13 TIMES, September 14, 2007 (attached to the complaint as Exhibits C and D, respectively).

14 On September 14, 2007, the complaint in this matter was filed with the Commission.

15 Later, on September 23, 2007, The Times published an article by Clark Hoyt, The Times'  
16 Public Editor,<sup>2</sup> in which he questioned the MOPA advertisement's content and stated that MOPA  
17 should not have been charged the "standby" rate of \$64,575. Clark Hoyt, *Betraying Its Own Best*  
18 *Interests*, THE NEW YORK TIMES, September 23, 2007. Hoyt described this rate as available to  
19 advertisers who are not guaranteed what day their advertisement will appear, only that it will be  
20 in The Times within seven days. According to Hoyt, because The Times agreed to run MOPA's

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<sup>2</sup> Hoyt's article describes The Times' Public Editor as serving "as the readers' representative. His opinions and conclusions are his own."

1 advertisement on a specific day, Monday, September 10, 2007, The Times should have charged  
2 MOPA a higher rate of \$142,083. Hoyt quoted Catherine Mathis, vice president of corporate  
3 communications for The Times, as acknowledging “[w]e made a mistake,” in that The Times’  
4 advertising representative failed to make it clear to MOPA that for the \$64,575 rate, The Times  
5 could not guarantee the Monday, September 10 placement; the representative, however, left  
6 MOPA with the understanding that the advertisement would in fact run that day.<sup>3</sup> On the same  
7 day as the Hoyt article appeared in The Times, MOPA announced that it would pay \$142,083 for  
8 its advertisement, and the committee did so the following day, September 24, 2007.

9 **B. Analysis**

10 The Act prohibits corporations such as The Times from making contributions in  
11 connection with Federal elections,<sup>4</sup> and prohibits political committees such as MOPA from  
12 knowingly accepting or receiving such contributions. 2 U.S.C. § 441b(a). The term  
13 “contribution” includes giving “anything of value” for the purpose of influencing any election for  
14 Federal office. 2 U.S.C. §§ 431(8)(A) and 441b(b)(2). The term “anything of value” includes all  
15 in-kind contributions. 11 C.F.R. § 100.52(d)(1).

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<sup>3</sup> Previously, The Times had reportedly defended its arrangement with MOPA regarding the cost of the advertisement. See, e.g., Emily Cadot, *MoveOn Ad Flap Likely to Be Replicated – On Both Sides – Through 2008*, CQ POLITICS.COM, September 19, 2007.

<sup>4</sup> The Times is a corporation organized under the laws of the State of New York.

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1       The provision of goods or services at less than the usual and normal charge for such  
2 goods or services is a contribution.<sup>5</sup> *Id.* The Commission's regulations include "advertising  
3 services" as an example of such goods and services. *Id.* If goods or services are provided at less  
4 than the usual and normal charge, the amount of the in-kind contribution is the difference  
5 between the usual and normal charge for the goods or services at the time of the contribution and  
6 the amount charged the political committee. *Id.* For the purposes of this provision, "usual and  
7 normal charge" for goods means the price of those goods in the market from which they  
8 ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.52(d)(2).

9       The issue of vendor discounts to political committees has been addressed by the  
10 Commission in a number of Advisory Opinions. In these AOs, the Commission has permitted a  
11 vendor to provide a discount to a political committee so long as the discount is made available in  
12 the ordinary course of business and on the same terms and conditions to other customers that are  
13 not political committees or organizations. *See, e.g.,* AOs 2006-1 (PAC for a Change); 1995-46  
14 (D'Amato); 1994-10 (Franklin National Bank).

15       Accordingly, this matter turns on whether the price paid for MOPA's advertisement fell  
16 below The Times' usual and normal charge for that kind of advertisement. *See* 11 C.F.R.  
17 § 100.52(d). The available information indicates that the appropriate charge turns on the  
18 understanding between The Times and MOPA regarding the placement of the advertisement.  
19 A large difference in price depends on whether the parties agreed that the advertisement would  
20 run on a certain date, an "open" arrangement, or whether the advertisement was not guaranteed to

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<sup>5</sup> A number of exemptions to this rule are set forth in 11 CFR Part 100, Subpart C, none of which are applicable here.

1 run on a particular day but would run at some point during the next week, a "standby"  
2 arrangement.

3 MOPA in its response denies that any corporate contribution was made and received in  
4 connection with its advertisement in The Times.<sup>6</sup> MOPA argues that even if the Commission  
5 had jurisdiction over the payment for the advertisement, the committee did not receive an  
6 improper corporate contribution because it paid \$142,083, the reported usual and normal rate  
7 within The Times' usual and normal billing cycle. MOPA resp. at 1, 6-8. Moreover, MOPA  
8 continues, even if the original quoted rate of \$64,575 was less than The Times' usual and normal  
9 rate, in order to avoid any questions or the appearance of impropriety, MOPA promptly paid the  
10 full price as soon as it discovered that there was a question whether the original quoted rate may  
11 have been erroneous. *Id.* at 1, 8.

12 The available information suggests that the \$64,575 rate initially agreed upon by MOPA  
13 and The Times was less than the usual and normal price of \$142,083 for an advertisement  
14 guaranteed to run on a particular day.<sup>7</sup> The difference between these two figures, \$77,508, would  
15 have constituted a corporate contribution from The Times to MOPA if MOPA had not paid the

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<sup>6</sup> Notwithstanding its political committee status, MOPA initially argues that even if it paid less than The Times' usual and normal rate for advertisements of this nature, a contribution did not take place, because MOPA's advertisement was not "for the purpose of influencing any election for Federal office," *see* 2 U.S.C. § 431(8)(A), nor was it "in connection with any election," *see* 2 U.S.C. § 441b(b)(2). MOPA resp. at 1, 4-6.

<sup>7</sup> The Times' website confirms the 8% full-page discount and 15% advertising agency commission discount that reduce the \$181,692 open rate cited in the complaint to the applicable open rate of \$142,083 for a full-page advertisement. *See* <http://www.nytimes.whsites.net/mediakit>.

1 higher rate of \$142,083 on September 24, 2007.<sup>8</sup> See 2 U.S.C. § 441b(a); 11 C.F.R. § 100.52(d).

2 Thus, MOPA appears to have paid the usual and normal rate for its advertisement. See 11 C.F.R.  
3 § 100.52(d).

4 Indeed, MOPA's payment, approximately two weeks after the advertisement ran, also  
5 appears to be timely. MOPA asserts that because the negotiations with The Times were made  
6 through its media vendor, Fenton Communications ("Fenton"), an established customer of The  
7 Times, no advance payment was required for the advertisement.<sup>9</sup> MOPA resp. at 7. Fenton is  
8 normally invoiced by The Times on a monthly basis, with payment due 15 days thereafter;  
9 Fenton bills the advertiser and then pays The Times. *Id.* at Exh. 2, Trevor Fitzgibbon  
10 Declaration at ¶ 5.<sup>10</sup>

11 It thus appears that The Times extended credit to MOPA in the ordinary course of  
12 business and MOPA paid for its advertisement in a timely manner. See 11 C.F.R. §§ 100.55 (the

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<sup>8</sup> MOPA disclosed a payment of \$165,717.56 on that date to Zimmerman & Markman, Inc. for a "Newspaper [sic] Ad" on its 2007 Year End Report. Counsel for MOPA has confirmed to the Commission that Zimmerman & Markman is a media vendor for MOPA and that this amount covers the \$142,083 rate for MOPA's advertisement in The Times plus production costs and markup.

<sup>9</sup> The Times' website page regarding "Credit and Payment Terms" states in part:

Advertisements must be paid for prior to publication deadline unless credit has been established by the advertiser and/or agency with The Times.

...

Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.

<http://www.nytimes.whites.net/mediakit>.

<sup>10</sup> On this occasion, however, MOPA requested an invoice from The Times in advance of Fenton's usual payment process. The Times provided an invoice for \$64,575, and MOPA proceeded to request a second invoice, for \$142,083, which The Times also provided. MOPA resp. at 7 and Exh. 4. MOPA paid The Times \$142,083 on September 24, 2007.

1 extension of credit by any person is a contribution unless the credit is extended in the ordinary  
2 course) and 116.3(b) (a corporation in its capacity as a commercial vendor may extend credit to a  
3 political committee provided that the credit is extended in the ordinary course of business and on  
4 terms substantially similar to nonpolitical debtors that are of similar risk and size of obligation).  
5 In sum, based on the available information, the Commission finds no reason to believe that  
6 MoveOn.org Political Action and Wes Boyd, in his official capacity as treasurer, violated  
7 2 U.S.C. § 441b(a).<sup>11</sup>

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<sup>11</sup> Because the available information indicates that MOPA paid the usual and normal price for its advertisement in the usual and normal timeframe, the Commission does not need to reach MOPA's argument that would permit a political committee to receive in-kind corporate contributions in connection with communications that were arguably not "for the purpose of influencing any election for Federal office." See 2 U.S.C. § 431(8)(A).